

SAMERIC CORPORATION OF DELAWARE, INC.,  
Plaintiff,  
v.  
CITY OF PHILADELPHIA,  
PHILADELPHIA HISTORICAL COMMISSION,  
and  
EDWARD A. MONTGOMERY, JR.,  
RICHARD TYLER, Ph.D.,  
CHRIS CASHMAN, DAVID BROWNLEE, Ph.D.,  
DAVID HOLLENBERG, BARBARA KAPLAN,  
JOAN FERRERA, and DAVID WISMER  
Individually and in Their Official  
Capacities as Members of the  
Philadelphia Historical Commission,  
Defendants.

On February 6, 1996, this Court denied Defendants' Motion to Dismiss Plaintiff's claims based on Pennsylvania's two

year Statute of Limitations, but granted Defendants' Motion to Dismiss Plaintiff's Procedural Due Process Claim for failure to state a claim. See Sameric Corporation of Delaware, Inc. v. City of Philadelphia, No. CIV.A. 95-7057, 1996 WL 47973 (E.D. Pa. Feb. 2, 1996). Now, after discovery has closed, Defendants move for summary judgment with respect to Plaintiff's remaining claims. For the following reasons, Defendants' Motion will be granted.

#### **STANDARD**

Pursuant to Rule 56(c), summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

#### **BACKGROUND**

By letter, dated March 28, 1986, the Philadelphia Historical Commission (the "Commission") notified Sameric

Corporation of Delaware, Inc. ("Sameric"), that, pursuant to Section 14-2007 of the Philadelphia Code, the Commission intended to consider a proposal to designate the Boyd Theater as historic. Sameric planned to demolish the Boyd Theater and develop that site along with adjacent properties which it owned. Thus, Sameric disfavored the designation and attempted to block its consideration. Sameric's efforts included two equity actions and six continuances of a public hearing at which the Commission planned to consider the designation.

On January 30, 1987, an action filed by Plaintiff in the Court of Common Pleas of Philadelphia County was removed by Defendants to federal court. By Order, dated March 4, 1987, Judge Fullam dismissed the action, stating that Plaintiff's action was not "ripe" because the Historical Commission had not yet determined whether the Boyd Theater should be designated "historic" nor had Plaintiff's application for a demolition permit been denied.

On April 2, 1987, the Commission voted to designate the Boyd Theater as a historical building. As a result of this designation, Sameric could not alter, renovate, modify, or demolish the interior or exterior of the Boyd Theater without the approval and supervision of the Commission. See Phila. Code § 14-2007(d).

On April 8, 1987, Sameric filed an application for a demolition permit with the Department of Licenses and

Inspections.<sup>1</sup> Because the Boyd Theater had already been designated as historic, Sameric's request was referred to the Philadelphia Historical Commission. Despite evidence (the opinions of the Commission's own expert- Cushman & Wakefield, and Sameric's experts- Samuel Evans, Architect Emanuel Reider and Spectacor) that the Sameric Theater was losing money and could not feasibly be reused, the Historical Commission denied Sameric's application for a demolition permit.<sup>2</sup> Sameric appealed, but later abandoned the appeal because of financial problems that resulted in the sale of the Boyd Theater to United

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<sup>1</sup> The Philadelphia Code provides that a building owner may obtain a demolition permit where (1) the building owner is suffering "financial hardship" or (2) a building cannot be used for any purpose for which it is or may be reasonably adapted. See Philadelphia Code, § 14-2007(7)(f). On April 9, 1987, Sameric submitted a letter with three attachments that showed the Sameric Theater suffered a net cash loss of \$546,623 in Fiscal 1985, a net cash loss of \$549,180 in Fiscal 1986 and that the theater was closed in September 1986; (2) the value of the property declined by more than \$12 million as a result of the designation; and (3) there are no alternative uses of the property since its historical designation as a single-screen "motion Picture Palace."

<sup>2</sup> On February 3, 1988, the Commission denied approval of Sameric's application for demolition of the Boyd Theater based on the following conclusions: (1) Sameric failed to demonstrate, in accordance with subsection 7(j) of the Code, that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return and that other potential uses of the property were foreclosed, (2) Sameric failed to show that the Boyd Theater could not be used for any purpose for which it is or may be reasonably adapted, and (3) the issuance of a demolition permit, in this instance, was not in the public interest. (Defendants' Ex. T. at III.) As for the major liability incurred by Sameric Corporation, the Commission found that Plaintiff's net cash loss of \$437,317.00 was due, in large part, to the remortgaging of the property. Id. at II.

Artists.

Meanwhile, Sameric had commenced another action in the Court of Common Pleas on or about April 24, 1987, challenging the designation of the Boyd Theater as historic. The parties subsequently agreed that, pursuant to 42 Pa.C.S. § 708, the Complaint must be treated as an appeal from the decision of the Historical Commission. On May 26, 1987, the Court of Common Pleas ordered that the appeal from the Commission's decision be dismissed. Upon further appeal, the Commonwealth Court, on May 2, 1989, ordered that the Commission's designation of the Boyd Theater be affirmed.

Subsequently, the Pennsylvania Supreme Court granted Sameric's petition for allowance of appeal to consider, inter alia, the constitutionality of the Commission's actions. While this matter was pending, Sameric sold the Boyd theater to United Artists Theater Circuit, Inc., however, Sameric retained all rights to damages resulting from the designation of the Sameric Theater as a historic structure.

On July 10, 1991, the Pennsylvania Supreme Court found that "by designating the theater building as historic, over the objections of the owner, the City of Philadelphia through its Historical Commission has `taken' the appellee's property for public use without just compensation in violation of Article I, Section 10 of the Pennsylvania Constitution . . . ." United Artists' Theater Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Commission, 595 A.2d 6, 7 (Pa. 1991).

Then, after granting Defendant City of Philadelphia's petition for reargument, the court reconsidered its earlier decision and held that "under the Constitution of Pennsylvania, the designation of a building as historic without the consent of the owner is not a 'taking' that requires just compensation; however, because the Commission acted outside of its statutory authority, [the court] vacate[d] the Commission's designation of the Boyd Theater as historic."<sup>3</sup> United Artists' Theater Circuit, Inc. v. City of Philadelphia, Philadelphia Historical Commission, 635 A.2d 612, 614 (Pa. 1993).

Plaintiff then filed the instant action, alleging that Defendants violated Plaintiff's substantive due process rights, under 42 U.S.C. § 1983, by designating the Boyd Theater as historic in an arbitrary and capricious manner, thus, preventing Plaintiff from obtaining a permit for the complete demolition of Boyd theater.<sup>4</sup> In addition, Plaintiff alleges that as a result of the improper designation of the Boyd Theater, it was unable to

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<sup>3</sup> The Historical Commission determined that both the interior and exterior of the theater were historically significant. United Artists, 635 A.2d at 621. However, the Pennsylvania Supreme Court found that "[t]he Historical Commission is not explicitly authorized by statute to designate the interior of the building as historically or aesthetically significant." Id. at 622.

<sup>4</sup> Specifically, Plaintiff alleges that the Boyd Theater was designated not because of its historic value, but because it could serve as a venue for live performances, constituting an improper motive. In this regard, Plaintiff asserts that the Philadelphia Code permits ten bases upon which a building may be designated as historic and, according to Plaintiff, none of these bases have anything to do with providing performance space for artistic endeavors.

obtain financing for which it had applied on its property. Plaintiff further alleges that the sale price of the Boyd Theater was decreased significantly, thereby causing Plaintiff foreseeable consequential damages. Thus, Plaintiff seeks compensatory and punitive damages.

### **DISCUSSION**

Defendants make the following five arguments in their summary judgment motion: (1) summary judgment should be entered in favor of Defendant Philadelphia Historical Commission because the Commission has no legal capacity to be sued and is not a proper defendant<sup>5</sup>; (2) there is no evidence that any violation of substantive due process has occurred; (3) Plaintiff has suffered no harm as a result of the historical designation of the Boyd Theater; (4) Defendants are immune from Plaintiff's claims under the Pennsylvania Constitution; and (5) the individual defendants are entitled to qualified immunity.

#### **1. Substantive Due Process**

To establish a claim under § 1983, two essential elements must be present: (1) the conduct complained of was committed by a person acting under color of state law, and (2) this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. Wagner v. Township of Harmar, 651 F. Supp. 1286, 1288

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<sup>5</sup> "Plaintiff acknowledges that the City of Philadelphia is the proper party defendant and does not oppose Defendants' request that the Philadelphia Historical Commission be removed as a defendant." (Plaintiff's Opposition Memorandum at 2 n.2.)

(W.D. Pa. 1987), aff'd, 826 F.2d 1054 (3d Cir. 1987). Here, Plaintiff alleges that Defendants' actions in designating the Boyd Theater as historic and, subsequently, denying a demolition permit violated Plaintiff's substantive due process rights.

"Substantive due process protects citizens from arbitrary and irrational acts of government." Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 692 (3d Cir. 1993). To prove a substantive due process violation, Plaintiff must show either (1) that the government's actions were not rationally related to a legitimate government interest; or (2) that the government's actions were motivated by bias, bad faith or improper motive. Id.

**(a) Improper Motive**

In their Motion for Summary Judgment, Defendants contend that the issue in this case is whether the Defendants actions were motivated by bias, bad faith or improper motive. In this regard, Defendants argue that the testimony of Merton Shapiro, who had controlling interest in the corporate ownership of the Boyd Theater at the time of the designation, merely indicates that (1) the Commission weighed the evidence differently than he did, and ultimately disagreed with his assessment that the Boyd Theater was not historically significant, and (2) the Commission incorrectly relied on evidence concerning the interior of the Theater as a basis for designation -- a mistake that does not constitute a due



process violation.<sup>6</sup> See Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 684 & n.14 (3d Cir. 1991) (mere violation of municipal law by local officials does not constitute denial of substantive due process), cert. denied, 503 U.S. 984 (1992). While Defendants acknowledge that there were brief discussions during Commission meetings of possible reuse of the Boyd Theater as a performance theater, Defendants argue that "[i]t is an enormous speculative leap to claim that the mere discussion of alternative uses for the Theater, standing alone, demonstrates bias, bad faith or improper motive." (Defs.' Mem. Supp. Summ. J. at 33.)

In response, Plaintiff points to the following evidence of record to support its § 1983 claims:

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<sup>6</sup> As noted above, the Pennsylvania Supreme Court, in vacating the entire designation order of the Commission, acknowledged that the Commission made an error of law by designating the interior and exterior of the Boyd Theater as historically and architecturally significant, however, the court did so reluctantly, explaining:

Having determined that the Commission made an error of law, we must apply the appropriate remedy. It would not be possible for us to vacate only the portion of the Order which designates the interior. We do not have before us any evidence regarding what interior portions support the exterior, nor can we separate the rational and evidence which referred only to the exterior of the Boyd Theater from that of the interior in order to review its sufficiency. Thus, we are constrained to vacate the entire order of the Commission.

United Artists, 635 A.2d at 622.

- (1) Defendant Barbara Kaplan admitted at her deposition to an improper motive and her statements constitute unequivocal testimony that she was interested in preserving the Boyd Theater because of its size and potential use as a performance space rather than its historic significance, as required under Section 14-2007 of the Philadelphia Code;<sup>7</sup>
- (2) Grace Gary, the Chairperson of the Designation Committee at the time the Committee voted to recommend designation, later left the Commission to become the Executive Director of the Preservation Fund of Pennsylvania, where she commissioned the Urban Partners' study that purported to show that the Sameric Theater could be converted into a venue for live performances;
- (3) Defendants Brownlee and Wismer displayed an interest in the rehabilitation of the Sameric theater for use for both movies and live performances; and
- (4) In denying the demolition permit for the Boyd Theater, Plaintiffs contend that the Historical Commission had only the Urban Partners' report commissioned by Grace Gary to refute the enormous volume of evidence supporting economic hardship.

(Plaintiff's Opposition Memorandum at 34-36.)

Furthermore, Plaintiff contends that a review of the

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<sup>7</sup> According to Plaintiff, Defendant Barbara Kaplan testified that her decision was "not because of the art deco elements." She continued: "I had a perspective. I thought that the theater should be preserved because it was a thousand-seat-theater, that it would be a tragedy to destroy a thousand-seat theater." (Kaplan Dep. at 55-56, Ex. E). Furthermore, at the designation hearing itself, on April 2, 1987, she had testified that "[a]ll I hear from all the cultural groups in this town is that there's a lack of performance space. We're looking at a 2000-seat theater. Just because its no longer useful for movies does not mean that there are not other uses for that theater." (Def. Mem., Ex. L at 109).

testimony at the April 2, 1987 meeting offers substantial support for Council President Street's observations "that this Commission would have grabbed even the slightest, most flimsy straw and use it as an excuse to certify that building and then subsequently prohibit its demolition." (Street Dep. Plaintiff's Ex. A at 25.) Plaintiff adds that the testimony of Shapiro and architect Emanuel Reider, that the building's decor is insignificant, undermines the Commission's asserted basis for designation.

Based on the above, Plaintiff argues that the record contains sufficient evidence that Defendants violated § 1983 when they designated the Boyd Theater as historic and refused to grant a demolition permit. Plaintiff asserts that the Historical Commission completely ignored evidence that Sameric was suffering financial hardship within the definition of Section 14-2007 and that its stated rationale for denying Plaintiff a demolition permit was a mere pretext designed to disguise its improper desire to create a performing arts facility on the site of the Boyd Theater.

However, as Defendants point out in their Reply Memorandum, the Historic Designation Ordinance is not so narrow that it precludes historic designation based on either the size of the theater or its suitability as a performance venue. (Defendants' Reply Memorandum at 17.) To the contrary, the Ordinance is broad enough to protect the possible cultural and economic gains which could accrue from preserving a theater of this size. Id. Indeed, the Ordinance specifically states:

(1) Declaration of public policy and purposes.

(a) It is hereby declared as a matter of public policy that the preservation and protection of buildings, structures, sites, objects and districts of historic, architectural, cultural, archeological, educational and aesthetic merit are public necessities and are in the interests of the health, prosperity and welfare of the people of Philadelphia.

(b) The purposes of this section are to:

(.1) **preserve buildings, structures, sites and objects which are important to the education, culture, traditions and economic values** of the City;

\* \* \* \* \*

(.5) **strengthen the economy of the City** by enhancing the City's attractiveness to tourists and by stabilizing and improving property values,

Phila. Code §§ 14-2007(1)(a) and (b) (emphasis added).

Moreover, subsection 5 of the Ordinance sets forth the criteria for designation as follows:

(5) Criteria for Designation. A building, complex of buildings, structure, site, object or district may be designated for preservation if it: (a) **Has significant character, interest or value as part of the development, heritage or cultural characteristics of the City,** Commonwealth or Nation or is associated with the life of a person significant in the past . . . .

Phila. Code § 14-2007(5) (emphasis added). Based on the above language, Defendants correctly argue that to the extent that Commissioner Kaplan's motivation included consideration of cultural and economic interests, such considerations are

permissible under the provisions of the Ordinance.

Here, Plaintiff has not raised a genuine issue of material fact as to whether Defendants lacked any rational basis for designating the Boyd Theater historic and, subsequently, denying Sameric a demolition permit. As noted earlier, subsection 5 of the Ordinance sets forth ten bases upon which a building may be designated as historic. While Plaintiff contends that "[t]he ordinance **does not** provide the Commission with license to designate any building (and restrict the owner's rights in the process) to satisfy the Commission's views as to cultural requirements of the City of Philadelphia[,]" (Plaintiff's Sur-Reply Memorandum at 5), a close reading of the first and most broadly worded basis, section 14-2007(5)(a) of the Philadelphia Code, indicates that the Commission may designate a building for preservation if it has significant interest or value as part of the development of the City. Thus, this Court concludes that the Commission had a rational basis for its designation of the Boyd Theater.

In addition, there are no genuine issues of material fact regarding Defendants' motives. Here, the only improper motive alleged by Plaintiff is "converting the [Boyd] Theater into a live performance venue." (Plaintiff's Opposition Memorandum at 46.) Such a claim cannot survive Defendants' Motion for Summary Judgment because Defendants' allegedly improper motive, as discussed above, falls within the purview of the Ordinance that the Historical Commission is operating under.

Thus, Defendants are correct in that "the inclusion in the Ordinance of cultural and economic factors as legitimate grounds for preservation of a building is fatal to the Plaintiff's entire substantive due process claim." (Defendants' Reply Memorandum at 24.) Because the Defendants' reasons for designating the theater and denying the demolition permit were related to an appropriate governmental purpose, as provided by the Philadelphia Code, Defendants cannot be held liable.

For similar reasons, the individual Defendants are entitled to qualified immunity.<sup>8</sup> Here, a reasonable public official could not know that a designation that preserved the theater based on its size and potential reuse as a performance space violated either the Ordinance or the Fourteenth Amendment. See Rich v. Bailey, No. CIV.A. 95-9632, 1996 WL 745298, at \*6 (E.D. Pa. Dec. 23, 1996) (holding that a borough official was entitled to qualified immunity since he reasonably could have believed that the Borough's building code provided him with

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<sup>8</sup> In this regard, Plaintiff has argued that Defendants violated clearly established rights under § 1983 when they designated the Boyd Theater as a historical structure with the improper motive of converting the Boyd Theater into a live performance venue and, in doing so, they irrationally denied Sameric a demolition permit, despite overwhelming evidence demonstrating economic hardship, no feasible reuse of the building, and lack of historic significance. Such actions, according to Plaintiff, should have been known by the individual Defendants to be violative of the rights of Plaintiff under settled Section 1983 case law. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

authority to require plaintiffs to install hardwired smoke detectors). Indeed, even if this Court had not already concluded that such considerations lie within the scope of the Ordinance, Defendants correctly point out that careful analysis of each individual Defendant's conduct and state of mind, which is proper in cases like this, see Grant v. City of Pittsburgh, 98 F.3d 116 (3d Cir. 1996), shows that the Commissioners were merely following their own reasonable interpretation of the Ordinance and, thus, are entitled to qualified immunity.<sup>9</sup>

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<sup>9</sup> Defendants put Dr. Brownlee's reference to performance space, during the April 2, 1987 designation hearing, into context. Defendants explain that during the course of the April 2, 1987 designation hearing, a member of the audience, Patrick Starr, interjected the issue of alternative uses of the theater. A discussion followed and concluded with this comment by Dr. Brownlee:

We're certainly not going to find a reuse for this building or any building sitting around the table and this is not what we should be discussing today. But it should be pointed out that one of the problems of performance space in this city is not the lack of large spaces, but the lack of medium size spaces, and I would leave it at that.

(Ex. L to Defs.' Mem. Supp. Summ. J. at 115.) Defendants argue that the above comment by Dr. Brownlee demonstrates no improper motive on his part.

Defendants further submit that Commissioner Street's testimony, that the Historical Commission had a predisposition toward designation when they entered their deliberations on April 2, 1987, is nothing more than his own view of how the evidence should have been weighed, especially since the Commission had already reviewed the report of the Designation Committee and had a prior hearing and vote on March 25, 1987.

As for the testimony of Grace Gary, Defendants argue that Gary's role in the Urban Preservation Fund's study of the Boyd Theater which showed that the Theater could not be converted

**(b) Demolition Permit**

Defendants address Plaintiff's introduction of the denial of the demolition permit as a completely separate administrative decision. With respect to this additional factual predicate for its claims, Defendants contend that such allegations are time-barred since the Plaintiff abandoned the appeal of the demolition permit denial in 1988 after the Boyd Theater was sold.

Plaintiff responds that the demolition permit application process was not a separate proceeding, but a subsidiary to the historical designation since the Historical Commission would not even have had jurisdiction to deny the demolition permit without designating the property "historic." Thus, Plaintiff contends that the demolition permit application process, like the larger action of improperly designating the property, should be recognized as tolled during the period that the defendants continuously opposed Plaintiff because the acts complained of involve a single scheme in which Defendants made two related administrative decisions.<sup>10</sup>

Even if this Court accepts Plaintiff's tolling

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to an alternative use has no probative value at all and there is no evidence that Ms. Gary herself considered the Boyd Theater's value as a performance space during the time she chaired the Designation Committee. Defendants add that Ms. Gary is not even a defendant in this case.

<sup>10</sup> Plaintiff further argues that its evidence regarding the demolition permit is admissible at trial to demonstrate Defendants' improper motive.



argument, Defendants correctly point out that any claims that are based on the denial of the demolition permit never ripened because there was never a final decision denying the Plaintiff a demolition permit. Thus, Defendants contend that since the Plaintiff sold the Boyd Theater part-way through the appeal process, any potential challenge to the permit denial has simply been foreclosed. Furthermore, Defendants submit that Plaintiff's failure to take advantage of the opportunity for contesting the denial of the demolition permit, despite full opportunity to do so, was, in effect, a superseding cause of any harm which Plaintiff may have suffered.<sup>11</sup>

In response, Plaintiff explains that it prosecuted the appeal for many months, but was forced to discontinue its appeal because the financial harm it suffered as a result of the historic designation of the Boyd Theater forced Plaintiff to sell its assets to United Artists. Thus, Plaintiff simply states that "[h]ad it pursued the appeal to its conclusion, there is nothing that could have been done as a result of the appeal to recoup the damages suffered by Sameric and therefore, failure to prosecute that appeal to the end was not a `superseding cause' of

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<sup>11</sup> Defendants point out that Judge Fullam held that there was no cognizable injury until the demolition permit was finally denied, and that denial never became final. See Sameric Corporation of Chestnut St., Inc. v. Philadelphia Historical Comm'n, Civ. A. No. 87-553, 1987 WL 7636 (E.D. Pa. March 5, 1987); see also Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) (Property owner's takings claim was premature where it had not yet obtained a local government's final decision on allowable use of property).

Plaintiff's injuries." (Plaintiff's Opposition Memorandum at 45) (citing Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 265, 267-68 (3d Cir. 1995), cert. denied, 116 S. Ct. 303 (1995)).

In Blanche Road, the Third Circuit held that the ripeness requirement that arises in zoning dispute cases does not apply to a plaintiff's claims that defendants acted deliberately and under color of state law to deprive them of their property rights by interfering in and delaying the issuance of permits, distinguishing such cases from claims that a property was unconstitutionally taken for a governmental purpose without just compensation. In doing so, Judge Roth wrote:

[P]laintiffs' claims are not dependent on a final decision from the county, since plaintiffs are not appealing from an adverse decision on a permit application. Rather, plaintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. Such actions, if proven, are sufficient to establish a substantive due process violation, actionable under § 1983, even if the ultimate outcome of plaintiffs' permit applications was favorable. This is a substantively different type of claim than that presented in the ripeness cases, and internal review of the individual permit decision is thus unnecessary to render such a claim ripe.

Id. at 267-68 (emphasis added).

However, the instant action is distinguishable in that

Sameric has not presented a case involving actions aimed at Plaintiff for reasons unrelated to the merits of its application for a demolition permit. See Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1035 (3d Cir. 1987) (noting that plaintiff did not present a case involving actions aimed at the plaintiff developer for reasons unrelated to land use planning), cert. denied, 482 U.S. 906 (1987). Here, Sameric claims that Defendants arbitrarily and irrationally made two related administrative decisions -- designating the Sameric Theater as historic and, subsequently, denying Plaintiff a demolition permit -- and that these decisions were part of a scheme to have the Boyd Theater converted into a live performance theater at Plaintiff's expense. However, like in Pace, Plaintiff's own allegations, that the Commission preserved the theater based on its size and potential reuse as a performance space, provide a legitimate justification for all of the contested actions. See Phila. Code § 14-2007(5)(a). Thus, Plaintiff's reliance on Blanche Road is misplaced.

## **2. The Pennsylvania Constitutional Claims**

Count IV of the Complaint seeks damages for alleged violations of unspecified sections of the Pennsylvania Constitution. Defendants have raised the defense of governmental immunity pursuant to the Political Subdivision Tort Claims Act. See 42 Pa.C.S.A §§ 8541-8564. Plaintiff acknowledges that the Pennsylvania Constitutional claims against the City of Philadelphia are barred by the Tort Claims Act, but contends that

its state constitutional claims against the individual Defendants should not be dismissed because it has alleged irrational and arbitrary behavior against the individual defendants that amounts to willful misconduct. Id. at § 8550; see also Wade v. City of Philadelphia, 765 F.2d 405, 411-412 (3d Cir. 1985); Crighton v. Schuylkill County, 882 F. Supp. 411 (E.D. Pa. 1995). However, to overcome the defense of official immunity, Plaintiff must come forward with some evidence that the individual Defendants knew that they were designating the Boyd Theater as historic based on its size and its possible cultural value as a performance space **and that such criteria were improper under the Ordinance.** See In Re City of Philadelphia Litigation, 938 F. Supp. 1264, 1271 (E.D. Pa. 1996). Because this Court has already determined that the individual Defendants were operating within the guidelines of the Ordinance, they are entitled to the defense of official immunity.

Based on the above, Defendants' Motion for Summary Judgment will be granted. An appropriate Order will follow.

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Individually and in Their Official  
Capacities as Members of the  
Philadelphia Historical Commission,  
Defendants.

AND NOW, this 14th day of July, 1997, upon consideration of Defendants' Motion for Summary Judgment, and all responses thereto, it is hereby ORDERED that Defendants' Motion is GRANTED.

BY THE COURT:

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Robert F. Kelly, J.